Office-Supreme Court, U.S.
FILED
AUG 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-282

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS C. MCCAIN, ET AL., APPELLANTS

v.

CHARLES E. LYBRAND, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE URGING REVERSAL

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QUESTIONS PRESENTED

1. Whether the Attorney General can be deemed to have granted preclearance pursuant to Section 5 of the Voting Rights Act to the use of at-large elections for selecting Edgefield County Council members by his failure to object to a 1971 Act that purported only to increase the size of the county council and that was submitted for review without any indication that the county wished preclearance for the use of at-large elections or that at-large elections were a change in voting practices that had never received preclearance.

2. Whether the district court erred in declining to enforce the Attorney General's objection to a 1976 Edgefield County resolution and ordinance on the ground that the Attorney General had precleared the transfer of powers to local government officials pursuant to the South Carolina Home Rule Act when he reviewed the State Attorney General's submission of that Act in 1975.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
A. Procedural history	2
B. Facts	3
C. The district court's decision	5
Summary of argument	7
Argument:	
I. The Attorney General did not preclear the 1966 change to at-large elections by failing to object to a 1971 act increasing the number of residency districts and council members	9
A. The 1966 change to at-large elections was never properly submitted for Section 5 review	10
B. The district court erred in inferring that the Attorney General evaluated the use of at-large elections when he reviewed the 1971 Act	14
C. It is reasonable to place on a covered jurisdiction the burden of identifying unambiguously those changes it is submitting for Section 5 review by the Attorney General	17
II. The district court erred in declining to enforce the Attorney General's objection to the 1976 resolution and ordinance on the ground that the Attorney General had precleared the transfer of powers to local government officials pursuant to the South Carolina Home Rule Act when he reviewed the State Attorney General's submission of that act in 1975	21
Conclusion	28

TABLE OF AUTHORITIES

Cases: Page

Allen v. *State Board of Elections*, 393 U.S. 544 10,16
Blanding v. *Dubose*, 454 U.S. 393 ..... 4, 11
City of Lockhart v. *United States*, No. 81-802 (Feb. 23, 1983) 27
City of Mobile v. *Bolden*, 446 U.S. 55 2
City of Richmond v. *United States*, 422 U.S. 358 .. 9
City of Rome v. *United States*, 446 U.S. 156 11
County Council v. *United States*, 555 F. Supp. 694 ..... 14, 16, 23
Georgia v. *United States*, 411 U.S. 526 .... 9, 17, 19, 20, 23
Herron v. *Koch*, 523 F. Supp. 167 20
Horry County v. *United States*, 449 F. Supp. 990 .. 22
Lytle v. *Commissioners of Election*, 376 F. Supp. 304, rev'd, 509 F.2d 1049, cert. denied, 419 U.S. 1032 2
Morris v. *Gressette*, 432 U.S. 491 18
Pitts v. *Cates*, 536 F.2d 56 16
Rogers v. *Lodge*, No. 80-2100 (July 1, 1982) 3
United States v. *Georgia*, Civil Action No. C76-1531A (N.D. Ga. Sept. 30, 1977), aff'd mem., 436 U.S. 941 ..... 16, 17
United States v. *Sheffield Board of Commissioners*, 435 U.S. 110 ..... 9, 11, 12, 13, 15, 17, 20
Woods v. *Hamilton*, 473 F. Supp. 641 ..... 4, 6, 22, 23, 24, 25, 26

Constitution, statutes and regulations:

U. S. Const.:
Amend. I 2
Amend. XIII 2
Amend. XIV 2
Amend. XV 2
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, Section 3, 96 Stat. 134 3
Voting Rights Act of 1965, 42 U.S.C. (& Supp. V) 1971 *et seq.* 2
42 U.S.C. 1972 2
42 U.S.C. (& Supp. V) 1973 ..... 2, 3
42 U.S.C. 1973c ..... *passim*
42 U.S.C. 1973j(d) 2

Constitution, statutes and regulations—Continued Page

Home Rule Act, S. C. Code Ann. §§ 4-9-10 *et seq.* (Law. Co-op. 1977 & Cum. Supp. 1982) 4
§ 4-9-10(b) (Cum. Supp. 1982) 4, 5, 21
§ 4-9-30 (& Cum. Supp. 1982) 26
§ 4-9-410 26
§ 4-9-620 26
§ 4-9-820 26
§ 4-9-1030 26
1966 S.C. Act 1104 ..... 3, 10, 12, 15, 16, 17, 19, 20, 26
1971 S.C. Act 521 ..... *passim*
28 C.F.R. (1980):
Section 51.5 11
Section 51.10(a)(4) 11
Section 51.10(a)(5) 12
Section 51.10(b) 11
Section 51.18 13
Section 51.19 12
28 C.F.R.:
Section 51.8 18
Section 51.14(a) 27
Section 51.20 25
Section 51.21 12
Section 51.25(b) 12
Section 51.25(o) 12
Section 51.32 20
Section 51.35 18
Section 51.39 19
36 Fed. Reg. (1971):
pp. 9781 *et seq.* 12
pp. 18186 *et seq.* 12

Miscellaneous:

Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 18

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INTEREST OF THE UNITED STATES

On October 12, 1982, the Court invited the Solicitor General to express the views of the United States in this case. We responded in a brief urging reversal, and on June 20, 1983, the Court noted probable jurisdiction.

This case raises questions concerning the preclearance of voting changes pursuant to the Attorney General's enforcement responsibilities under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Under Section 5, the Attorney General must review changes in election laws submitted by covered jurisdictions in order to determine whether such changes have either the purpose or the effect of denying or abridging the right to vote on account of race or color. The Attorney General has authority under the Act to initiate suits to prevent imple-

mentation of changes in election laws prior to compliance with the preclearance procedures of Section 5. See 42 U.S.C. 1973j(d). The Court's resolution of the questions presented in this case will affect the Attorney General's execution of these statutory responsibilities.

STATEMENT

A. Procedural History

Appellants, black voters of Edgefield County, South Carolina, initiated this suit in 1974 against the five members of the Edgefield County Council, the three members of the Edgefield County Board of Election Commissioners, and the President of the Executive Committee of the Edgefield County Democratic Party. Appellants alleged that the county's use of an at-large system for electing members of the county council violated the United States Constitution and federal civil rights statutes [1] because it diluted black voting strength and that the residency districts from which council members ran were malapportioned. J.S. App. 2a-3a. The district court granted appellants' motion for summary judgment on the malapportionment claim, *Lytle* v. *Commissioners of Election*, 376 F. Supp. 304 (D.S.C.), but that ruling was reversed on appeal, 509 F.2d 1049, 1054 (4th Cir.), and this Court denied certiorari, 419 U.S. 1032 (1974).

Appellants' dilution claim was tried in 1975 and, after unsuccessful attempts to achieve a settlement, the district court granted judgment for appellants in April 1980. Shortly thereafter, this Court rendered its decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), and the district court granted appellees' motion to vacate its decision and reopened the case to permit the parties to submit additional evidence concerning whether the at-large scheme was adopted or maintained with discrimina-

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[1] Specifically, appellants alleged violations of the First, Thirteenth, Fourteenth and Fifteenth Amendments and of 42 U.S.C. (& Supp. V) 1971, 1972, and 1973. J.S. App. 2a.

tory intent. The district court has not yet ruled on appellants' dilution claim. J.S. App. 4a-5a.[2]

The district court also permitted appellants to supplement their complaint to allege that the county's use of the at-large voting scheme violated Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, because it was a voting change implemented without the preclearance required by that statute. A three-judge district court was convened to hear appellants' Section 5 claims. J.S. App. 2a, 5a. This appeal is from that court's order (*id.* at 2a-22a) denying appellants' request for injunctive relief.

B. Facts

As of November 1, 1964, Edgefield County was governed by a three-member Board of Commissioners consisting of an elected supervisor of roads and two board members appointed by the Governor upon the recommendation of the county's state legislative delegation. In June of 1966, the state legislature enacted Act 1104, which created a three-member county council for Edgefield County with all three council members elected at-large from residency districts. It is undisputed that this Act was subject to the preclearance requirements of Section 5 but was never submitted for Section 5 review. J.S. App. 5a-6a.

In 1971, Act 1104 was amended by Act 521, "An Act To Amend Act 1104 Of 1966 * * * So As To Increase The Number Of Districts And The Number Of County Council Seats." As its title indicates, the Act increased both the number of residency districts in Edgefield County and the number of council members from three to five. J.S. App.

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[2] Appellants have moved to reinstate the April 1980 judgment in their favor on the basis of this Court's decision in *Rogers* v. *Lodge*, No. 80-2100 (July 1, 1982), and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended by Section 3 of the Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134. The district court has taken that motion under advisement (Docket Sheet entry of Nov. 5, 1982).

6a-7a, 10a. The Act was submitted to the Attorney General pursuant to Section 5 and, after requesting and receiving additional information, on November 24, 1971, the Assistant Attorney General for the Civil Rights Division advised that "[t]he Attorney General does not interpose any objections to the change in question." J.S. App. 43a.

In 1975, South Carolina enacted the Home Rule Act, S.C. Code Ann. §§ 4-9-10 *et seq.* (Law. Co-op. 1977 & Cum. Supp. 1982). This Act transferred some powers from the state legislature to county officials and afforded each county the opportunity to hold a referendum by July 1, 1976, to determine whether to change its form of government to one of five alternative forms designated by the Act. The legislation further provided that if no referendum were held by July 1, 1976, the county would "have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect in the county immediately prior to that date." *Id.* § 4-9-10(b). By letter of August 28, 1975, the Attorney General interposed no objection to the Home Rule Act provision that authorized local governments to hold referenda on form of government, but he reserved the right to review the form of government adopted by each local government. The letter observed that in addition to those counties that voted to adopt a new form of government "those counties which do not conduct an election to change the form of government will be assigned a form of government according to the provisions of Section 14-3701(b) of the Act [S.C. Code Ann. § 4-9-10(b) (Cum. Supp. 1982)]. This assignment of such forms of government also constitutes a change which is subject to the preclearance requirements of the Voting Rights Act of 1965."[3] See *Blanding* v. *Dubose*, 454 U.S. 393, 396 (1982).

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[3] The text of the August 28, 1975, letter is quoted in full in the district court's opinion in *Woods* v. *Hamilton*, 473 F. Supp. 641, 645 (D.S.C. 1979), and is set forth in note 20, *infra*.

Edgefield County did not hold the referendum provided for by the Home Rule Act, but instead passed a resolution and ordinance on June 21, 1976, adopting the council-administrator form of government, the form that the legislature previously had determined was most like that already in effect in the county. S.C. Code Ann. § 4-9-10 (b) (Cum. Supp. 1982). The resolution and ordinance were submitted to the Department of Justice for Section 5 preclearance. J.S. App. 8a. By letter dated February 8, 1979, the Attorney General interposed an objection to the resolution and ordinance, noting (*id.* at 30a) that while the council-administrator form of government provided for "ostensibly, the same system of election used by the county in electing its present council, we note differences in that body as presently constituted and as it would exist under the Home Rule Act." After describing these differences and other considerations that influenced his decision, the Assistant Attorney General concluded (*id.* at 37a) that Edgefield County had not met its "burden of proving both that the change in question was not adopted with a discriminatory purpose and that its effect will not be discriminatory." He then stated (*ibid.*) that "on behalf of the Attorney General, I must interpose an objection to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in Edgefield County."

C. The District Court's Decision

Appellants argued below that the county's use of the at-large electoral scheme should be enjoined because the 1966 Act, which initiated the scheme, had never been precleared under Section 5 and, alternatively, because the Attorney General had interposed a valid objection to the implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system in Edgefield County.

The district court rejected both arguments. It first held (J.S. App. 10a-13a) that although the 1966 Act itself

ad not been submitted for preclearance, the change to at-large elections embodied therein had received preclearance when the Attorney General subsequently failed to interpose an objection to the 1971 Act increasing the number of residency districts and council seats. The court found that because the Attorney General, in reviewing the 1971 Act, had requested additional information, including "*a copy of the election statute now in force*" (*id.* at 11a; emphasis by the court), his review had encompassed "all aspects of the Act, including the effect of the at-large with residency requirements voting that had been implemented in 1966" (*id.* at 12a). The court further reasoned (*id.* at 13a) that the language of the 1971 Act—" 'striking out' " all the provisions of the 1966 Act relating to the form and method of election and replacing them with "completely new provisions"—provided an additional basis for inferring preclearance of the at-large features of the earlier Act.

The district court rejected appellants' alternative argument on the ground that the 1976 resolution and ordinance adopting the council-administrator form of government did not create a "change" subject to Section 5 preclearance. J.S. App. 14a-18a.[4] The court relied on *Woods* v. *Hamilton*, 473 F. Supp. 641 (D.S.C. 1979), in holding (J.S. App. 17a) that the Attorney General's (August 28, 1975) letter[5] "precleared both the holding of referenda and the transfer of powers under the Home Rule Act" and that "the June 21, 1976 resolution and

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[4] The court held (J.S. App. 14a-16a) that appellees had standing to raise the question whether the resolution and ordinance produced a change notwithstanding the Attorney General's prior determination that those enactments did.

[5] The district court erroneously referred (J.S. App. 17a) to June 27, 1975, as the date of the Attorney General's letter preclearing some aspects of the Home Rule Act. South Carolina submitted the Home Rule Act for preclearance by letter dated June 27, 1975; the Attorney General's response was dated August 28, 1975. See *Woods* v. *Hamilton*, *supra*, 473 F. Supp. at 645.

ordinance resulted in no change in the form or method of electing [the] Edgefield County Council, and * * * are not a change subject to § 5 preclearance."

SUMMARY OF ARGUMENT

1. The district court erred in concluding that the Attorney General precleared the 1966 change to at-large elections in Edgefield County when he reviewed the 1971 Act increasing the number of residency districts and council members. The 1966 Act was never submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, although it is conceded that it should have been submitted. Although both the decisions of this Court and the Attorney General's guidelines require a clear and unambiguous statement of the changes for which preclearance is sought, neither South Carolina nor Edgefield County specifically brought the provision for at-large elections to the Attorney General's attention in the context of the 1971 submission. Neither the submission of the 1971 Act nor the provision of a copy of the 1966 statute in response to the Attorney General's follow-up request for information constituted a sufficient request for preclearance for the at-large election feature. In addition, there is no indication that in 1971 the Attorney General in fact reviewed and precleared anything other than the changes submitted to him for review, that is, the changes in the number of residency districts and size of the county council. The Attorney General himself did not consider the at-large feature of the 1966 Act to have been precleared, as his subsequent correspondence with state officials indicates.

The district court's decision improperly shifts to the Attorney General the burden of ascertaining what, if any, unprecleared changes are included in laws submitted for Section 5 review. Since only the jurisdiction knows what it wishes to have precleared, it is sensible to require

the jurisdiction to identify a submitted change, rather than to require the Attorney General to conduct an investigation to determine what is being submitted. Review by the Attorney General is meant to be a speedy alternative to judicial review of voting changes, but it can serve this function only if jurisdictions identify clearly the changes for which they seek preclearance. If jurisdictions are not required to identify such changes, they will be encouraged to make ambiguous submissions and to attempt subsequently to exploit the ambiguities, as county officials have attempted to do here.

2. The district court also erred in declining to enforce the Attorney General's objection to the 1976 Edgefield County resolution and ordinance. The court based its conclusion on its belief that the Attorney General had precleared the transfer of powers under the Home Rule Act in 1975 and that the 1976 resolution and ordinance did not change the county's form of government and therefore was not a voting change subject to preclearance under Section 5. However, the court erred in concluding that the Attorney General precleared the transfer of powers feature of home rule in 1975. As the Attorney General's August 1975 letter indicates, he precleared only the holding of referenda pursuant to the Home Rule Act, not the other features of the Act. These other features, including the transfer of powers, were not ripe for review in 1975. Thus, the 1976 resolution and ordinance implementing the transfer of powers constituted a voting change subject to preclearance, and the court should have enforced the Attorney General's objection.

ARGUMENT

I. THE ATTORNEY GENERAL DID NOT PRECLEAR THE 1966 CHANGE TO AT-LARGE ELECTIONS BY FAILING TO OBJECT TO A 1971 ACT INCREASING THE NUMBER OF RESIDENCY DISTRICTS AND COUNCIL MEMBERS

The decision of the three-judge court that the Attorney General precleared the 1966 change to at-large elections when he reviewed the 1971 Act that increased the number of residency districts and council members is erroneous under this Court's consistent interpretation of Section 5.

Section 5 of the Voting Rights Act bars certain covered jurisdictions (including Edgefield County) from implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964" without obtaining preclearance from the Attorney General of the United States or the United States District Court for the District of Columbia. A jurisdiction requesting preclearance under Section 5 has the burden of making a clear submission of any change in voting practices and of demonstrating that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote" (42 U.S.C. 1973c) on account of race or language minority status. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); see also *City of Richmond* v. *United States*, 422 U.S. 358, 380-381 (1975) (Brennan, J., dissenting). As the Court held in *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 136 (1978), "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." Contrary to the district court's conclusion, the 1966 change to at-large elections was never properly submitted to or precleared by the Attorney General.

A. The 1966 Change To At-Large Elections Was Never Properly Submitted For Section 5 Review

It is undisputed that the 1966 statute—Act 1104—which provided for at-large elections, was never submitted to the Attorney General pursuant to Section 5. Rather, in 1971 Edgefield County submitted for Section 5 review Act 521, "An Act To Amend Act 1104 Of 1966 * * * So As To Increase The Number Of Districts And The Number Of County Council Members." As its title suggests, the sole purpose of the 1971 statute was to increase the number of residency districts and, accordingly, the size of the county council. The statute accomplished that end by adding new provisions of law and by striking out and re-enacting existing provisions, including the provision for at-large elections.

Neither the district court nor appellees suggest that the provision for at-large elections was specifically brought to the Attorney General's attention in the context of the 1971 submission. The letter submitting the 1971 Act for preclearance simply stated, "[i]n accordance with the provisions of Section 5 of the Voting Rights Act of 1965, there are submitted herewith copies of the following listed acts * * *" (U.S. Amicus Br. App. 1a).[6] The letter listed 18 separate acts without further explanation of how those acts changed voting practices in South Carolina. Nevertheless, the district court ruled that the technical re-enactment in the 1971 Act of the provision for at-large elections constituted a proper submission of that provision. That conclusion cannot be squared with this Court's admonition in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), that a submission must request the Attorney

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[6] Neither side to these proceedings was able to locate the actual letter submitting the 1971 statute for preclearance and, hence, it is not a part of the record in this case. We found a copy of the letter in our files and attached it as an appendix to our earlier submission. H2206 was the South Carolina House bill number of Act 521 of 1971.

General's consideration in "some unambiguous and recordable manner" (*id.* at 571):

> [W]e do not think the Act contemplates that a "submission" occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. * * * A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.

See also *City of Rome* v. *United States*, 446 U.S. 156, 169-170 n.6 (1980). When a jurisdiction adopts legislation that makes a clearly defined change in its form of government and that also reenacts pre-existing provisions of law, the mere submission of a copy of that legislation cannot constitute an "unambiguous" request for Section 5 review of those provisions that do not purport to change the law.

This conclusion is fully supported by guidelines that the Attorney General has adopted specifying submission procedures, which this Court has held are entitled to deference. See *Blanding* v. *Dubose*, 454 U.S. 393, 401 (1982); *United States* v. *Sheffield Board of Commissioners*, *supra*, 435 U.S. at 138. The version of the guidelines that was in effect prior to the completion of the county's 1971 submission required that a submission "clearly set forth" the voting change in a manner "adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting." 28 C.F.R. 51.5, 51.10(a)(4)(1980).[7] The guidelines

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[7] The guidelines (28 C.F.R. 51.10(b)(1980)) also

> strongly urge[d] the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:
>
> * * * * *
>
> (4) A copy of any other changes in law or administration relating to the subject matter of the submitted change

also required "[a] statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made." 28 C.F.R. 51.10(a)(5) (1980). Had the county complied with this requirement it would have clearly and unambiguously communicated its intent to seek preclearance for the at-large election provision by explaining why it had been in force since 1966. Since the only differences specifically called to the attention of the Attorney General were the changes in the number of residency districts and the size of the council, he was entitled to conclude that the submission was limited to the changes in law reflected in the Act's stated purpose. See *United States* v. *Sheffield Board of Commissioners*, *supra*, 435 U.S. at 137-138.[8]

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affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. * * *

Proposed guidelines were published for comment before the initial submission of the 1971 Act (36 Fed. Reg. 9781 *et seq.* (1971)) and were published in final form (36 Fed. Reg. 18186 *et seq.* (1971)) several days before the submission was complete. Even though the final version of the guidelines was not in effect when the 1971 Act was initially submitted, Edgefield County thus was on notice of the kind of information and explanation the Attorney General deemed necessary to identify changes that were not readily apparent from the face of the legislation and that the duty to provide this information rested with the covered jurisdiction (28 C.F.R. 51.19 (1980)).

The guidelines that were promulgated in 1971 are cited to the 1980 edition of the Code of Federal Regulations. Those guidelines were amended on January 5, 1981 (see note 8, *infra*).

[8] The Attorney General's current guidelines are even more explicit. They state that covered jurisdictions are responsible for submitting changes that affect voting (28 C.F.R. 51.21), for providing a "clear statement of the change" in voting practices when it is not readily apparent from the face of the submission (Section 51.25(b)), and for stating whether the prior voting practice has received preclearance (Section 51.25(o)). It was not readily apparent from the face of the 1971 Act that the at-large provision was a

The district court's reliance (J.S. App. 10a-12a) on the Attorney General's routine request (see 28 C.F.R. 51.18 (1980)) for more information following his receipt of the 1971 submission also is misplaced. As the court below noted (J.S. App. 11a), the Attorney General specifically requested "a copy of the election statute now in force" and received a copy of the 1966 Act, which provided for the at-large election of county council members. He thus "had the 1966 Act before him and was aware that the form and method of election of the Edgefield County Council then in effect had been adopted in 1966" (J.S. App. 12a). But the 1966 Act did not on its face indicate that it was a change subject to Section 5. Moreover, if anything, the 1966 statute confirmed what was apparent on the face of the 1971 Act—that the voting change then being submitted was a change only in the *number* of residency districts and, hence, only in the *size* of the county council. As noted above (pages 10-12, *supra*), however, merely making the Attorney General aware of legislation enacted after the effective date of Section 5 coverage does not constitute an adequate submission. This is especially true where, as here, the jurisdiction does not even inform the Attorney General that the earlier statute was subject to Section 5 and had never received preclearance. As the Court noted in *United States* v. *Sheffield Board of Commissioners*, *supra*, 435 U.S. at 138 n.28, the burden of submission rests with the jurisdiction, and the "Attorney General should [not] be charged with notice of all provisions of local law." The Attorney General thus was entitled to assume that the at-large method of election was validly in force and therefore not subject to review at the time the 1971 Act was submitted.

The United States District Court for the District of Columbia has rejected an argument similar to that made

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change affecting voting, nor was there any indication that this practice, which had been in existence since 1966, required, but had never received, preclearance.

by appellees and accepted by the court below. In *County Council* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983), Sumter County argued that the Attorney General had precleared a 1967 change from an appointed county commission to a county commission elected at-large by virtue of his failure to object to a 1968 Act amending the 1967 Act so as to allow the commission to decide which of its members would serve four-year terms and which would serve two-year terms (*id.* at 702). Sumter County never submitted the 1967 Act to the Attorney General for preclearance, and the 1968 Act was one of seven acts that South Carolina, following its usual practice, had forwarded without explanation in a letter to the Attorney General that did not request preclearance or describe any voting changes. The district court rejected Sumter County's claim that the Attorney General's silence about the 1968 Act effected preclearance of the entire at-large election system (*id.* at 703):

> As the Supreme Court ruled in *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U.S. 110 (1978) * * *, a political subdivision must state that it desires preclearance before it can claim preclearance by silence. *Id.* at 136-38 * * *. That ruling applies here and requires summary judgment for defendants on plaintiffs' claim that the Attorney General's silence about Act No. 1339 of 1968 precleared an at-large election system for Sumter County.

A similar conclusion is appropriate here.

B. The District Court Erred In Inferring That The Attorney General Evaluated The Use Of At-Large Elections When He Reviewed The 1971 Act

The district court also erred in concluding that the Attorney General in fact evaluated, and therefore precleared, the change to at-large voting when he reviewed the 1971 Act. The court inferred (J.S. App. 12a) that

the Attorney General's review of the 1971 Act "encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966" because he was provided with a copy of the existing election law as well as information concerning previous candidates, election results, and residency district boundaries. In the absence of clear evidence, however, it cannot properly be concluded that the Attorney General considered and precleared anything other than the particular change that was submitted to him for review, that is, the 1971 changes in the number of residency districts and size of the county council. In *United States* v. *Sheffield Board of Commissioners, supra*, 435 U.S. at 136-138, this Court reversed a district court holding that the Attorney General had precleared a change in the form of government when he failed to object to the county's request for approval of a referendum on that issue. The Court held that it was improper to infer preclearance of the change in form of government because the county did not comply with Section 5 guidelines for submission that require a clear statement that the county was seeking preclearance for that particular change. Likewise, in this case it was improper to infer that the Attorney General precleared all aspects of the 1971 Act, including those initially implemented in 1966.

The November 24, 1971, letter of preclearance refers only to the 1971 Act (J.S. App. 43a-44a). Moreover, while the information the Attorney General requested and received concerning the 1966 Act and its application was sufficient to enable him to make the determination whether the new residency district lines were drawn in a non-discriminatory manner, it was not sufficient for him to evaluate the 1966 change to at-large elections. If he had intended to review the at-large aspect of the voting scheme he would have needed, in addition, information concerning the *pre*-1966 method of election, in order to determine whether the change from the appointive system that was in effect on November 1, 1964, to the at-large electoral system that was inau-

gurated in 1966 had a discriminatory purpose or effect.[9] The Attorney General neither requested nor received any such information, and he therefore was in no position to evaluate or preclear the at-large feature encompassed in the 1971 Act.

Furthermore, the Attorney General himself did not consider the at-large feature of the 1966 Act to have been precleared. In a December 12, 1980, letter he advised state officials that the 1966 Act had never been submitted or precleared (J.S. App. 40a-42a). In these circumstances, the district court erred in concluding that the Attorney General in fact had evaluated and precleared the change to at-large elections.[10]

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[9] The district court in *County Council* v. *United States*, *supra*, has under submission the question whether Sumter County's change from an appointive to an at-large electoral system violates Section 5 of the Voting Rights Act. The court denied plaintiffs' motion for partial summary judgment on that question and noted the kinds of factual and legal issues that would be pertinent to deciding compliance with Section 5, including an evaluation of how many blacks would be appointed to office if the appointive system were in effect today (555 F. Supp. at 705); whether the change to at-large voting was purposefully discriminatory (*id.* at 706); and the presence or absence of racial bloc voting (*ibid.*).

[10] This case is distinguishable from *United States* v. *Georgia*, Civil Action No. C76-1531A (N.D. Ga. Sept. 30, 1977), aff'd mem., 436 U.S. 941 (1978). There, the district court dismissed a suit brought by the United States to compel Georgia to submit for preclearance two provisions of its 1964 Election Code on the ground that, "[i]n the absence of any requirement that a specific submission procedure be followed," Georgia had complied with the submission requirements of *Allen* v. *State Board of Elections*, *supra*, 393 U.S. 544, when, in 1970, it requested that the Attorney General review the entire state election code, which included the two 1964 voting changes. *United States* v. *Georgia*, No. 77-1376 (1977 Term) J.S. App. 11a. In so holding, the court relied heavily (*id.* at 11a-12a) on a March 30, 1973, letter from the Assistant Attorney General, Civil Rights Division, that stated that one of the two changes had been precleared in 1970 and on a decision of the Fifth Circuit, *Pitts* v. *Cates*, 536 F.2d 56 (1976), that indicated that the other change also had been precleared (*id.* at 57).

Here, by contrast, there is no finding that appellees, by their 1971 submission, sought review of *all* of the provisions of Act 521.

C. It Is Reasonable To Place On A Covered Jurisdiction The Burden Of Identifying Unambiguously Those Changes It Is Submitting For Section 5 Review By The Attorney General

As we describe above, Section 5 places on covered states and political subdivisions the burden of proving to either the United States District Court for the District of Columbia or the Attorney General that any proposed change in a voting practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race * * *." 42 U.S.C. 1973c; see *Georgia* v. *United States*, *supra*, 411 U.S. at 538. The district court's decision effectively shifts to the Attorney General the burden of ascertaining what, if any, unprecleared changes are included in laws submitted for Section 5 review. That result is contrary not only to this Court's decisions and the pertinent guidelines, but also to common sense.

The requirement under Section 5 that covered jurisdictions identify the submitted change is a reasonable and necessary one. Only the jurisdiction knows what changes it wishes to have precleared. Thus, if Edgefield County wanted the Attorney General to review an unprecleared change that was not apparent from the face of the 1971 Act, it could have so stated in a letter. See *United States* v. *Sheffield Board of Commissioners*, *supra*, 435 U.S. at 138. Instead, South Carolina simply transmitted the 1971 Act and 17 other pieces of state legisla-

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Nor is there any direct evidence, like the letter in *United States* v. *Georgia*, indicating that the Attorney General in fact precleared the 1966 change to at-large elections. To the contrary, the Attorney General's letter of December 12, 1980, correctly advised South Carolina officials that the 1966 Act had never been submitted to the Attorney General or the United States District Court for the District of Columbia for preclearance (J.S. App. 40a-42a). Moreover, the appellees in this case had the benefit of regulations promulgated by the Attorney General to aid them in formulating an unambiguous request for preclearance of the change to an at-large electoral scheme.

tion to the Attorney General without any explanation of how they changed voting practices. Common sense dictates that the Attorney General should not be required to conduct an investigation to determine what is being submitted when that information is in the control of the submitting jurisdiction.

Moreover, Congress established an administrative review process as an alternative to preclearance by the United States District Court for the District of Columbia because it wished "to provide a speedy alternative method of compliance." *Morris* v. *Gressette*, 432 U.S. 491, 503 (1977). The Attorney General must rely on covered jurisdictions to identify voting changes clearly if the administrative review process is to remain a "speedy alternative." The volume of Section 5 submissions [11] and the strict deadlines the Act imposes for objecting to changes [12] make it impractical for the Attorney General to attempt to uncover changes a jurisdiction *might* have intended to submit for review.

Had Edgefield County chosen the more burdensome alternative of seeking a preclearance declaratory judgment from the United States District Court for the District of Columbia for the 1971 Act, it would have had to file a complaint specifying the features of the Act for which it sought approval. A similar degree of specificity should be required in the case of submissions for administrative review, particularly since the same standards are applied in the judicial and administrative review

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[11] In 1971 the Attorney General received 1,118 submissions for Section 5 review; 160 of those were from South Carolina. In 1980 the Attorney General received 7,340 submissions for Section 5 review. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992 and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1742-1743 (1982).

[12] The Attorney General has 60 days within which to interpose an objection to a change after receipt of a submission in a form that satisfies his guidelines. 42 U.S.C. 1973c; 28 C.F.R. 51.8, 51.35.

processes. See 28 C.F.R. 51.39. If lower courts may shift to the Attorney General the burden of uncovering changes that are potentially subject to Section 5 review, the result may well be to render "the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, *supra*, 411 U.S. at 538. In addition, allowing less specificity in the case of administrative review would invite jurisdictions to make ambiguous submissions and subsequently exploit the ambiguities by claiming that the Attorney General had precleared changes the jurisdiction did not initially submit. In fact, that is just what has occurred in this case.

It is virtually certain that neither South Carolina nor Edgefield County intended to submit the at-large election feature of the 1971 Act for Section 5 review when the state forwarded the 1971 Act to the Attorney General. The county apparently believed (albeit erroneously) that the 1966 Act had already been precleared. In 1978, the county twice claimed, in the course of submitting its home rule resolution and ordinance to the Attorney General, that the 1966 Act had received preclearance.[13] The county repeated this claim in October 1980 in opposing appellants' motion to file a second supplemental com-

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[13] On September 29, 1978, the county's attorney wrote to the Department of Justice "enclosing herewith an Act of 1966 establishing the Edgefield County Council and amendments thereto in their chronological order, all of which have been approved by the Justice Department" (Vol. II, Lybrand Dep., Exh. G). A few months later, on December 6, 1978, the county administrator wrote a letter in connection with this submission, stating that "the implementation of Home Rule did not significantly change, alter, or increase the powers of the Edgefield County Council as set forth in Act No. 1104 of 1966 Joint Acts and Resolutions and the amendments thereto that were approved by the U.S. Justice Department" (Vol. II, Lybrand Dep., Exh. I, at 1). "Vol. II" refers to Volume II of the district court record, which consists of the deposition of Charles E. Lybrand.

plaint.[14] After the Department of Justice advised the South Carolina Attorney General's office in December 1980 that the 1966 Act had never been submitted for preclearance (J.S. App. 40a-42a), the court granted appellants' motion to amend the second supplemental complaint to allege this deficiency (Vol. I, Docket No. 42, Order of Jan. 6, 1981), and the appellants moved for summary judgment on this claim (Vol. I, Docket No. 48). At that point the county claimed for the first time that the Attorney General had precleared the use of at-large elections when he failed to object to the 1971 Act (Vol. I, Memorandum In Opposition To Plaintiffs' Motion For Summary Judgment, dated Apr. 9, 1981). The district court erred in accepting the county's after-the-fact attempt to capitalize on the ambiguity of the 1971 submission.[15]

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[14] The county contended that the motion should not be granted because the resolution merely continued a form of government established by the 1966 Act, as amended by the 1971 Act, "both of which statutes were submitted to and pre-cleared by the United States Justice Department subsequent to their respective enactments" (Vol. I, Memorandum in Opposition to Motion for Leave to File Second Supplemental Complaint, dated Oct. 27, 1980, at 1). "Vol. I" refers to Volume I of the district court record.

[15] At the very least, any doubt concerning whether a particular voting change has been submitted or precleared ought to be resolved against the jurisdiction making the submission because it has the burden of proving compliance with Section 5 of the Voting Rights Act. See *Georgia* v. *United States*, *supra*, 411 U.S. at 536-538; *Herron* v. *Koch*, 523 F. Supp. 167, 174-175 (E.D.N.Y. 1981). If a court holds that a jurisdiction failed to make an adequate submission of a change in voting practice, the jurisdiction can always ask for expedited review of that change. 28 C.F.R. 51.32. But if a court erroneously concludes that the Attorney General has precleared a change, the purpose of Section 5, to "shift[] the advantages of time and inertia from the perpetrators of the evil to its victims" (*United States* v. *Sheffield Board of Commissioners*, *supra*, 435 U.S. at 121) is defeated.

II. THE DISTRICT COURT ERRED IN DECLINING TO ENFORCE THE ATTORNEY GENERAL'S OBJECTION TO THE 1976 RESOLUTION AND ORDINANCE ON THE GROUND THAT THE ATTORNEY GENERAL HAD PRECLEARED THE TRANSFER OF POWERS TO LOCAL GOVERNMENT OFFICIALS PURSUANT TO THE SOUTH CAROLINA HOME RULE ACT WHEN HE REVIEWED THE STATE ATTORNEY GENERAL'S SUBMISSION OF THAT ACT IN 1975

The district court erred further in declining to enforce the Attorney General's objection to the 1976 Edgefield County resolution and ordinance (J.S. App. 14a-18a).[16]

In 1976 Edgefield County enacted a resolution and ordinance [17] adopting the council-administrator form of government that, in the absence of a referendum to change the form of government, is prescribed for the county by the Home Rule Act (S.C. Code Ann. § 4-9-10(b) (Cum. Supp. 1982)). The resolution and ordinance were submitted to the Attorney General, who objected to "implementation of the requirements of the South Carolina Home Rule Act in the context of the at-large election system existing in

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[16] We note that the jurisdictional statement (J.S. 20-22) frames this question in terms of whether a transfer of powers under home rule is a covered voting change under Section 5. As we noted in our earlier submission (at 12-13), and as we point out below (note 18), that issue is not raised by the decision in this case. We believe the thrust of appellants' second question is whether the 1976 resolution and ordinance were subject to preclearance and thus whether the district court should have enforced the Attorney General's objection.

The Court need not reach this issue if it concludes, as we contend in the preceding section, that Edgefield County never received preclearance for the change to at-large elections. In that event, the basis for the district court's conclusion that the 1976 resolution and ordinance were not a change in voting—that the form and method of electing the county council mandated by it already had been precleared (see J.S. App. 17a)—would be eliminated.

[17] Vol. I, Docket No. 51A, Stipulations, Exh. F.

Edgefield County" (J.S. App. 37a). While acknowledging that the resolution and ordinance provided for "ostensibly, the same system of election used by the county in electing its present council" (*id.* at 30a), the Attorney General nonetheless concluded that the additional powers transferred by the Home Rule Act "alter the council as the organ for the governance of the electorate and, accordingly, form the basis for evaluating the system under which the more responsible form of government ordained by the Home Rule Act is to be elected" (*id.* at 31a).

The district court refused to enforce the Attorney General's objection to Edgefield County's use of at-large elections for the county council because the court concluded that the resolution and ordinance did not create a change subject to Section 5 preclearance (J.S. App. 17a). The court based its holding on the conclusion of the court in *Woods* v. *Hamilton*, 473 F. Supp. 641, 644-647 (D.S.C. 1979), that the Attorney General had precleared the transfer of powers provided for by the Home Rule Act (as opposed to merely the holding of referenda pursuant to the Act) when that Act was submitted for preclearance in 1975 and that subsequent implementing legislation that did not change the form of government was not a change subject to Section 5 preclearance. Thus, the validity of the court's reasoning ultimately rests on whether it was correct in concluding that the Attorney General precleared the transfer of powers feature of the Home Rule Act in 1975. If the Attorney General did not preclear this transfer of powers in 1975, the 1976 resolution and ordinance implementing the transfer would be a change requiring preclearance (*Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978)),[18] and the dis-

[18] As we pointed out in our earlier amicus submission (at 12-13), neither the court below nor any other court has held that a transfer of powers from state officials to county officials is not a change in voting procedures within the meaning of Section 5. Cf. *Woods* v. *Hamilton*, *supra*, 473 F. Supp. at 644. Thus, implementation of the transfer in 1976 is subject to preclearance unless that transfer was precleared earlier. The court below and the

trict court would be bound to enforce the Attorney General's objection to the change. See *Georgia* v. *United States*, *supra*. Although we presumably are estopped from relitigating the issue of whether the Attorney General precleared the transfer of powers feature of home rule in 1975 by our failure to appeal the decision in *Woods* v. *Hamilton*, *supra*, the appellants, who were not parties to that litigation, are free to present that question for review. As we explain below, we believe appellants are correct in contending that the Attorney General did not preclear the transfer of powers feature of home rule in 1975.[19]

In *Woods* v. *Hamilton*, private plaintiffs and the United States sought to enjoin officials in Charleston County, South Carolina, from implementing the Home Rule Act in that county. We took the position that the Attorney General had precleared only the holding of referenda to determine whether to change the form of government, while reserving the right to review each county's subsequent implementation of all other aspects of the Home Rule Act. That position is supported by the text of the August 28, 1975, letter, which states that the "Attorney General does not interpose an objection to the Act, insofar as it authorizes each county and city to hold a referendum on the question of the form of its government." 473 F.

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court in *Woods* v. *Hamilton* concluded (in our view, erroneously) that the Attorney General did not preclear the transfer of powers in 1975 when he reviewed the Home Rule Act.

[19] We contended in *Woods* v. *Hamilton* that the Attorney General did not preclear the transfer of powers feature in 1975. The court rejected our view, and we did not appeal. Thereafter, in *County Council* v. *United States*, *supra* (see 555 F. Supp. at 704), we stated in our brief that the transfer of powers feature was ripe for review in 1975 and was precleared by the Attorney General then; in light of our failure to appeal *Woods* v. *Hamilton*, we presumably could not have taken a contrary position. However, we continue to believe that this issue was wrongly decided in *Woods* v. *Hamilton*, and it is this view that we set forth below.

Supp. at 645.[20] The letter goes on to reserve the right to consider the adoption of a form of government by those counties that would choose a new form of government

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[20] The full text of the August 28, 1975, letter (473 F. Supp. at 645) is as follows:

> This is in reference to the South Carolina Home Rule Act (R. 396), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965. Your submission was received on June 30, 1975.
>
> The Attorney General does not interpose an objection to the Act, insofar as it authorizes each county and city to hold a referendum on the question of the form of its government. However, because the Act requires additional action by the State Legislature prior to each of the State's 46 counties adopting a form of government under this Act, it will be necessary that each such form of government be submitted for federal review under Section 5 of the Voting Rights Act. It is our understanding that the additional action required by the Legislature includes providing for the number of the councilmen or commissioners for those counties which select an at-large method of election and, in addition, designating the districts for counties selecting district elections of county officers. In addition, those counties which do not conduct an election to change the form of government will be assigned a form of government according to the provisions of Section 14-3701(b) of the Act. This assignment of such forms of government also constitutes a change which is subject to the preclearance requirements of the Voting Rights Act of 1965.
>
> With regard to municipalities, the provisions of Articles 2 and 8 of the Act require the municipalities to either adopt a new form of government or forfeit their articles of incorporation. Both the adoption of a new form of government and the forfeiture of the articles of incorporation are changes within the meaning of Section 5 which must be submitted for federal review prior to their implementation.
>
> Lastly, the failure of the Attorney General to interpose an objection to this Act at this time does not bar any subsequent judicial action to enjoin enforcement of such changes.

The parties apparently did not submit a copy of the August 28, 1975, letter for the district court record in the present case. However, the court may take judicial notice of the text of the letter, since it is reprinted in *Woods* v. *Hamilton*.

and to note that such adoption must be submitted for Section 5 review. The letter then stated (473 F. Supp. at 645):

> [i]n addition, those counties which do not conduct an election to change the form of government will be assigned a form of government according to the provisions of Section 14-3701(b) of the Act. This assignment of such forms of government also constitutes a change which is subject to the preclearance requirements of the Voting Rights Act of 1965.

The district court ruled in *Woods* that the entire Home Rule Act had been submitted to the Attorney General for preclearance in 1975 and that when he expressly precleared one feature of it and expressly reserved the right to object to others, the failure to mention specifically the transfer of powers constituted preclearance of that feature as well (473 F. Supp. at 644-647). We believe the court erred in its construction of the August 28, 1975, letter. It is clear from a reading of the letter that the only feature of the Act that the Attorney General was preclearing was the holding of referenda. Thus, it should not be assumed that silence concerning the transfer of powers feature indicates unspoken approval. Nor does the specific reservation of the right to object to new forms of government or assignment of designated forms of government suggest approval of the transfer of powers; rather, because the transfer of powers would occur at the time the form of government was chosen or assigned, it is reasonable to conclude that the Attorney General was also reserving the right to object to the transfer. This conclusion is reinforced by the fact that the features of the Act other than the holding of referenda were not ripe for Section 5 review at the time of submission of the Act in 1975. See 28 C.F.R. 51.20. At that point it was not possible to tell what form of government ultimately would be in place in any particular county; nor was it possible to determine what powers would be assumed pursuant to the Act until each local government decided

whether to change its form of government and what form to adopt.

The effect of the transfer of powers could differ depending on the form of government adopted or assigned and could be considered properly only in conjunction with that adoption or assignment. The Home Rule Act (S.C. Code Ann. § 4-9-30 (Law. Co-op. 1977 & Cum. Supp. 1982)) set forth increased powers for each alternate form of government, except for the board of commissioners form, which was granted more limited powers (*id.* § 4-9-1030).[21] Thus, had Edgefield County opted for the board of commissioners form of government, it would have enjoyed fewer powers than it had pursuant to the 1966 Act; under any other form it would have enjoyed somewhat greater powers.[22] Furthermore, the extent of authority exercised by council members would vary depending on the form of government chosen. Under the council-supervisor form the supervisor is an elected council member who exercises various administrative powers (S.C. Code Ann. § 4-9-410 (Law. Co-op. 1977)), whereas under the council-administrator form (*id.* § 4-9-620) and the council-manager form (*id.* § 4-9-820) such powers are exercised by an employee of the council. Thus, the Attorney General could have reviewed the transfer of powers

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[21] S.C. Code Ann. § 4-9-30 (Law. Co-op. 1977 & Cum. Supp. 1982) states in part:

> Under each of the alternate forms of government listed in § 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof: * * *

The district court in *Woods*, in quoting this provision, deleted the language excepting the board of commissioners form of government. See 473 F. Supp. at 646 n.8.

[22] See J.A. App. 30a for a description of how the powers Edgefield County had under the 1966 Act were enhanced under home rule.

only in the abstract in 1975, and any preclearance would have been premature.

Since the August 28, 1975, letter did not preclear the adoption or assignment of a form of government, and since the transfer of powers properly could be considered only in connection with that adoption or assignment, the letter did not preclear the transfer of powers.[23] Rather, the transfer of powers was properly considered along with the 1976 Edgefield County resolution and ordinance adopting the council-administrator form of government, to which the Attorney General interposed an enforceable objection. The district court erred in declining to enforce that objection.[24]

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[23] The conclusion that the Attorney General did not preclear the transfer of powers provision of the Home Rule Act in 1975 is consistent with the practice set forth in the current Section 5 guidelines, which provide that the Attorney General's failure to object to enabling legislation "does not exempt the political subunit itself from the requirement to obtain preclearance when it seeks or is required to institute the change in question, unless implementation by the subunit is explicitly included and described in the submission of such parent legislation." 28 C.F.R. 51.14(a).

[24] Even if the Court were to reject our contentions on the first question, that would not bar reversal based on the second question. The implementation of the transfer of powers in 1976 meant that the at-large election feature would exist in a different context than in prior years. The entire system established in 1976, including the "preexisting" elements such as at-large elections, was a covered change and was subject to preclearance under Section 5. See *City of Lockhart* v. *United States*, No. 81-802 (Feb. 23, 1983), slip op. 5-6. Thus, assuming the Court were to find that the Attorney General precleared the use of at-large elections when he reviewed the 1971 Act, the Attorney General still was not precluded from entering an enforceable objection to that feature in connection with the 1976 resolution and ordinance.

The substantive merits of the Attorney General's objection are not at issue in this case. We note, however, that the objection is not precluded under the holding of *City of Lockhart*, *supra*, slip op. 7-10, because, *inter alia*, the objection rested on a conclusion with respect to discriminatory purpose as well as discriminatory effect (see J.S. App. 37a).

CONCLUSION

The judgment of the district court should be reversed and the case remanded to afford Edgefield County an opportunity to seek preclearance of the change to at-large elections.

Respectfully submitted.

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AUGUST 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 412519 88